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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 852

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 10. 1957. [R. 1146.] A Petition for Rehearing was filed below on February 1, 1957, and was denied on February 13, 1957. [R. 1156.]

Opinion Below.

The opinion of the Court of Appeals is reported at 240 F. 2d 87. It is printed in Appendix C hereto, *infra,* p. 19.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

The Question Presented.

A jury, by general verdict and special interrogatory, found that plaintiff's refusal to answer questions asked by a Congressional committee was not offensive to public morals and did not bring him into disrepute. May a court of appeals hold that such refusal constitutes moral turpitude as a matter of law, and thus justify the plaintiff's discharge under a contract of employment?

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra,* page 1.

Statement.

This is an action for wrongful discharge under a contract of employment. It was commenced in the Superior Court of the State of California, and was removed for diversity to the United States District Court for the Southern District of California on defendant's petition. [R. 12.]

The parties stipulated at pre-trial [R. 21-27] that petitioner was by profession a motion picture producer and director, that respondent is engaged in the business of producing motion pictures and that on February 10, 1947, they entered into an employment contract. On October 29, 1947, petitioner appeared as a witness under subpoena before the Committee on Un-American Activities of the House of Representatives, 80th Congress, and after being sworn, gave the testimony [R. 330-335] which is set forth in full herein, *infra,* Appendix D, pages 30 to 33. On November 24, 1947, the House of Representatives adopted a resolution certifying to the United States Attorney for the District of Columbia the Committee's

report as to petitioner's refusal to answer certain questions.

It was also stipulated that petitioner well and truly performed all directing and producing services required of him until on or about November 27, 1947. [R. 22.] On that date respondent notified petitioner that he had recently refused to answer questions propounded to him by a Committee of the House of Representatives and that petitioner had offended the community, had brought himself in disrepute, and thus had violated Article 16 of his employment contract, which provides as follows:

> "16. At all times commencing on the date hereof and continuing throughout the production and distribution of the Pictures, the Producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community and public morals or decency or prejudice the corporation or the motion picture industry in general; and you will not wilfully do any act which will tend to lessen his capacity to comply fully with this agreement, or which will injure him physically or mentally."

Nine days after the firing and on December 5, 1947, a District of Columbia Grand Jury indicted the petitioner for a misdemeanor, to wit, the refusal to answer questions put by the Committee as to whether or not he was a member of the Screen Writers Guild and as to whether or not he was or ever had been a member of the Communist Party. Two and a half years later, on June 22, 1950, the petitioner was found guilty of the crime charged in the indictment, and on September 27, 1950, petitioner was sentenced to both fine and imprisonment. [R. 27.]

The first trial below was to a jury. On February 15, 1952, the jury found a general verdict in petitioner's favor and in addition returned the following answer to a special interrogatory: That petitioner had not by his conduct, individually or in concert and agreement with others, at and in connection with a hearing of the House Committee on Un-American Activities in October, 1947, violated any of the provisions of Article 16 of his employment contract. [R. 37-38.]

Petitioner's case was tried simultaneously with the case of *Ring Lardner, Jr. v. Twentieth Century-Fox Film Corporation.* The jury returned a verdict in Lardner's favor as to both the issue of breach of contract and of waiver. The trial court denied the employer's motion for a new trial in the *Lardner* case and the employer appealed. However, in petitioner's case the respondent's motion for a new trial was granted upon the grounds that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice. [R. 46.] The case herein was not retried until the Court of Appeals for the Ninth Circuit rendered its decicision in *Twentieth Century-Fox Film Corporation v. Ring Lardner, Jr.*, 216 F. 2d 844, 51 A. L. R. 2d 778. [R. 141; App. B, p. 2.]

Upon a stipulation of the parties [R. 47] petitioner's case was retried without a jury and before the same District Judge who had heard the case originally when sitting with the jury. The proceedings on the retrial were very brief. Petitioner offered the entire record and exhibits that were offered in the original trial of the action and then rested. [R. 128.] Respondent offered evidence showing that petitioner had been indicted and convicted subsequent to his discharge. Petitioner objected to the receipt in evidence of these facts upon the ground that

these events had occurred after the notice of discharge had been given him. However, the court admitted the items on the basis of the ruling of the Court of Appeals for the Ninth Circuit in *Twentieth Century-Fox v. Lardner*, 216 F. 2d 844, saying [R. 129-130]:

> "The Court: 'Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this court has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he (the petitioner) had violated the contract * * * as a matter of law under the Ninth Circuit's decision."

When the case was finally submitted, the trial court made the following statement [R. 141-142]:

> "There is only one thing that I can do and that is grant the defendants judgment based upon the reasoning of * * * the Lardner case.
>
> "One reason I granted a new trial in the Scott case was because they didn't find there was a waiver and there has been nothing offered here that indicates any change of evidence insofar as waiver is concerned.
>
> "Your question is whether or not a man conducting himself as Scott apparently did, under the guidance of Mr. Kenny, conducted himself before a Senatorial committee as he did and his subsequent conviction involves the question of moral turpitude. As a matter of fact his conviction was grounds for termination of the contract. Of course the contract expired before that conviction.
>
> "Mr. Kenny: 'Yes, that is right. And of course our point and we are not pressing it now, under the Quinn case Scott could not have been convicted be-

cause the Quinn case held that a witness is entitled to a—'

"The Court: 'I have sent a lot of men to jail who shouldn't have been imprisoned.

'We are living in a time of change, not only insofar as the law is concerned, but changes in everything.

'As I say, I have sent many a Jehovah Witness to jail who under the present ruling of the Supreme Court should not have been committed.

'But that is a matter that has to be decided by the Supreme Court and I am controlled by the Ninth Circuit, so I am going to direct counsel for the defendants to prepare findings in accordance with the court's ruling.' "

Said Findings of Fact were subsequently signed by the Court [R. 49] and a judgment in favor of the defendant was entered. [R. 57.] However, the trial court indicated in making the critical Findings concerning petitioner's conduct that he was not making a Finding of Fact but was compelled to find in accordance with the decision in the *Lardner* case. Finding XI commences with the statement: "In pursuance to the case of *Twentieth Century-Fox v. Lardner,* 216 F. 2d 844, the court finds that . . ." [R. 54-55; App. C, p. 25.]

To the decision of the Court of Appeals affirming this judgment, this petition for certiorari is directed.

The Court of Appeals held the petitioner's contract and conduct could not be distinguished from Lardner's contract and conduct and stated "We believe *Lardner's* case (216 F. 2d 844) was correctly decided and further believe that it should stand as authority here." [App. C, p. 28.]

When Lardner petitioned for certiorari to this Court, October Term, 1954, No. 520, the respondent urged denial

of the Writ because the judgment then sought to be reviewed was not final and stated that: "Conceivably under retrial petitioner may still prevail on the ground of waiver so that he would not have been prejudiced by the decision of the Court of Appeals." (P. 7, Note 3, Brief in Opposition to Petition for Writ of Certiorari.) Certiorari was denied, 348 U. S. 944. However, in the case at bar petitioner has now had his retrial. He was not permitted to prevail because the trial court considered itself bound by the *Lardner* decision to find that petitioner had breached his contract as a matter of law when he refused to answer the Committee's questions. The objection of prematurity is now removed. Since the *Lardner* decision was, in effect, the controlling decision below it is set forth in full herein as Appendix B, pages 2-18.

Reasons for Granting the Writ.

1. This Court's decision in *Slochower v. Board of Education,* 350 U. S. 551, is irreconcilable with the *Scott* and *Lardner* decisions of the Ninth Circuit. In *Slochower,* this Court emphatically condemned the practice of imputing any reprehensible motive to a witness who refused to disclose whether he had been a member of the Communist Party, thus giving the highest support to what the jury in this case found in its verdict. The *Lardner* decision, upon which the Ninth Circuit decision in the present case is based, expressly held that refusal to answer the questions concerning membership in the Communist Party was conduct involving moral turpitude. *Slochower* holds just the contrary. It is true that in *Slochower* the witness invoked the Fifth Amendment, while the petitioner here did not invoke that amendment, but suggested reliance on the First Amendment. [R. 334, App. D, p. 33.] It should be remembered that the decision establishing the Fifth

Amendment as a shield against these interrogations by Congressional committees had not been rendered at the time Scott was compelled to decide on a course of conduct. (*Blau v. United States,* 340 U. S. 159, decided Dec. 11, 1950.)

But in any event, the refusal to answer concerning party affiliation, whether or not the proper amendment is invoked, is the heart of the matter. The existence of moral turpitude cannot turn on nice distinctions, such as asserting a privilege or a challenge to a Congressional committee with technical precision which, now, hindsight makes possible.

2. The decision of the Court below that petitioner's conduct constituted moral turpitude as a matter of law is in conflict with the decision of this Court in *Sinclair v. United States,* 279 U. S. 263, 299 (1929), as construed in *United States v. Murdock,* 389, 397 (1933), and as tacitly assumed to be the law in *Barsky v. Board of Regents,* 347 U. S. 442, 446 (fn. 6), 452 (fn. 10) (1954).

Sinclair had argued to this Court that if he had made an honest mistake of law in refusing to answer, he was guilty of no crime. But this Court told him that this would be no defense since "moral turpitude is not involved."

Later, this Court said in *Murdock* (p. 397):

> "The applicable statute (in Sinclair's case) did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the questions propounded."

Yet if this decision is not corrected, petitioner is guilty of moral turpitude as a matter of law, and his personal service contracts are outlawed merely because his lawyers were unable to advise him correctly in October, 1947, as to whether the question propounded was relevant. We respectfully submit that the problem has not yet been resolved by this Court and is now before it for consideration in *Watkins v. United States*, October Term, 1956, No. 261.

If the construction given *Sinclair* by the court below is correct, then the language of that case is indeed a trap for the unwary. Much of the difficulty in *Barsky's* case turned upon the contention that his offense (like petitioner's and Sinclair's) involved no moral turpitude. At all stages of *Barsky's* case, this was assumed to be the state of the law. Barsky's suspension was ultimately upheld by this Court—not on the ground that he had committed an act of moral turpitude—but rather on the ground that the New York statute permitted license suspension upon conviction of *any* crime at all.

3. In the absence of statutory or judicial declaration by a State, a United States court does not have the power in a diversity case to declare public morals in the face of a contrary declaration by a jury.

No decision of any court of the State of California, and no statute, has been cited which holds or says that contempt of Congress constitutes moral turpitude. The parties below recognized that the question was one of fact, not law, and submitted the issue to the jury for a finding on a special interrogatory. [R. 37.]

The decision of the Court of Appeals holding that Scott's conduct constituted moral turpitude as a matter of law is unwarranted judicial fiat, an attempt to make the public policy of a State by a United States court.

The decision of the District Court of Appeal in *County of San Bernardino v. Creamery Co.*, 103 Cal. App. 367, 284, Pac. 457, quotes from 6 Cal. Jur. at page 1099 as follows:

> "The policy of the state can be ascertained only by reference to the constitution and laws passed under it, or which is the same thing, to the principles underlying and recognized by the constitution and laws. Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because contrary to public policy, unless the transaction contravenes some positive statute or some well established rule of law." (P. 373.)

See also discussion in *Maryland Casualty Co. v. Fidelity Co.*, 71 Cal. App. 492, 497, 236 Pac. 492.

Diversity jurisdiction must follow state law and policy. (*Angel v. Bullington*, 330 U. S. 183, 192 (1947).

> "The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits (the Constitution and laws and judicial decisions made known to us) will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions and upon which men may and will complexionally differ. * * * We disclaim any right to enter upon such examination, beyond

what the State Constitutions, and laws, and decisions necessarily bring before us."

Story, J., in *Vidal v. Girard,* 2 How. 127, 198 (1844).

The *Lardner* decision and the opinion in the present case hold that refusal to answer the Committee's question constitutes moral turpitude as a matter of law. Such a declaration would seem beyond the powers of a United States court to make; and the fact that it is against a jury's verdict underscores the point here argued: if a jury of the State's citizens says, as a matter of fact, that the conduct was not offensive to public morals, does it not appear to be beyond the rightful powers of a United States court to hold the contrary as a matter of law?

4. Whether Scott's conduct offended against public morals was a question of fact, not of law. There was no issue concerning what Scott had done. The only question was whether his admitted conduct offended the community or had brought him in disrepute. By a special interrogatory the jury found that the conduct in question had done none of these things. It is submitted that that determination was beyond reach of an appellate court.

What is offensive to public morals presents a question of fact.

Johnson v. United States, 186 F. 2d 588, 589-590;
Knoles v. United States, 170 Fed. 409.

In *United States v. Kennerly,* 209 Fed. 119, an obscenity case, it was said:

> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of *general notions about what is decent.* A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (p. 121.)

See, also:

United States v. Levine, 83 F. 2d 156.

5. The Court of Appeals holds, in effect, that a mere violation of a contempt statute involves moral turpitude. Prior decisions hold that "moral turpitude which may be involved in a crime does not exist merely because there has been a crime, a violation of law." (*United States v. Carrollo,* 30 Fed. Supp. 3, 6; and see cases collected in annotation at 95 L. Ed. 900.) But since moral turpitude is not a necessary part of this offense (*Sinclair*) and since conduct does not involve moral turpitude merely because that conduct has been made a crime (*Coykendall v. Skrmetta,* 22 F. 2d 120), the Court of Appeals erred in overruling the jury's verdict and the jury's findings in the special interrogatories.

6. Unless corrected by this Court, the *Lardner* case, decided before *Slochower,* will be revived by the decision below. In the face of a contrary determination by a jury, the decision makes legal outcasts of men and women by branding refusal to testify as moral turpitude as a matter of law.[1]

What *Slochower* had attempted to remedy has been undone now by the decision below. If contempt of Congress constitutes moral turpitude as a matter of law, then, notwithstanding the determination of a jury, there has been added a terrifying punishment for the misdemeanor—deprivation of livelihood.

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[1]A detailed study of the whole problem is to be found in Horowitz, "Loyalty Tests for Employment in the Motion Picture Industry," 6 Stanford Law Review 438-472 (May, 1954), See also, Annotation, "Discharge from Private Employment on Ground of Political Views or Conduct," 51 A. L. R. 2d 742.

> "The Hollywood blacklist, unlike the graylist, can be counted. Whether the studios maintain and exchange actual lists is academic, since public, printed lists have been provided for them. First there were the lengthy lists published by the California Tenney Committee, which obviously contributed to the compilations made by the House Un-American Activities Committee. In its annual reports for 1952 and 1953, the House Committee published lists of 324 writers, producers, directors, actors, miscellaneous craftsmen, and many wives of these people who had been identified as Hollywood Communists before the Committee during all of its investigations up to the date of the report. However, the names include many who either never worked in the film or radio industry or were not working there when they were named. When wives and others who never worked in the industry at all are excluded from the Committee's list of 324 names, there are 212 remaining who have actually worked in Hollywood who are now blacklisted." Poe, "The Hollywood Story," Vol. 5, Frontier, Los Angeles, No. 7, pp. 8, 9 (May, 1954).

7. On January 21, 1957, this Court granted certiorari in *Wilson v. Loew's,* Oct. Term, 1956, No. 552, a decision of the California District Court of Appeal sustaining a demurrer against an action founded on the alleged concerted activity of motion picture producers to "blacklist" persons who refused to answer questions before the House Committee on Un-American Activities.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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